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THE EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms A Riccobono	**v**	**Bryan Cave LLP**

Heard at: London Central

On: 28 February – 3 March, 20-23 March 2017

Employment Judge: Ms A Stewart

Members: Mrs C I Ihnatowicz
Ms J Webber

Representation:
Claimant: Mr J Bromige of Counsel
Respondent: Mr M Fodder of Counsel

JUDGMENT

The unanimous Judgment of the Tribunal is as follows:

1 The Claimant's complaint that she was unfairly dismissed by virtue of section 99 of the Employment Rights Act 1996 and Regulation 20 of the Maternity and Parental Leave Regulations 1999, is not well-founded and fails.

2 The Claimant's complaint that she suffered unlawful discrimination within the meaning of section 18(2) of the Equality Act 2010 is not well-founded and fails.

3 The Claimant withdrew her complaint of sex discrimination under section 13 of the Equality Act 2010 at the Hearing.

Employment Judge A Stewart
17 May 2017

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REASONS

Introduction

1. The Claimant, Ms Alycia Riccobono, by her Claim Form presented to the Tribunals on 7 March 2016, brings the following complaints before the Tribunal:

   (a) That she was automatically unfairly dismissed because the reason for her dismissal was that she was pregnant and/or for a reason connected with her pregnancy, contrary to **section 99 of the Employment Rights Act 1996 and Regulation 20 of the Maternal and Parental Leave Regulations 1999.**

   (b) That she suffered discrimination on the grounds of her pregnancy and/or her pregnancy related illness, contrary to **section 18(2) of the Equality Act 2010,** in that she was dismissed.

   (c) In the alternative, that she suffered direct sex discrimination contrary to **section 13 of the Equality Act 2010**.

2. The Respondent denies that the Claimant's pregnancy and/or any pregnancy related illness were matters of which they were aware at the time that the dismissal decision was taken and played no part whatever in that decision. The Respondent contends that the Claimant was dismissed before the end of her probationary period because of poor work performance/capability.

3. The Tribunal heard evidence from the Claimant and from the following witnesses called by the Respondent; Ms Carol Osborne, Managing Partner

of the Respondent; Mrs Soile Helena Nathanson, who joined the Respondent as a partner specialising in structured finance/corporate trust on 5 January 2015; Ms Rachel Kelly, who joined the Respondent as a partner on 5 August 2015 specialising in structured finance and capital markets.

Conduct of the Hearing

4. A member of the Tribunal panel, Mrs Ihnatowicz, explained to the parties in open Tribunal on the first day of the Hearing that she had been a member of the Industrial Law Society Committee at the same time as Counsel for the Respondent, Mr Fodder, for a period of not more than two years ending about 4 or 5 years ago. After due consideration the Claimant stated that she had no objection to Mrs Ihnatowicz continuing to sit on the Tribunal.

5. During her evidence the Claimant unreservedly withdrew the allegations made in her statement that Mrs Nathanson had "significantly padded" her billing of a client and the Claimant apologised to Mrs Nathanson and to the Tribunal for having made this allegation.

The Issues

6. The agreed issues which the Tribunal has had to determine were as follows:-

   (1) Did Ms Osborne, as dismissing officer, know or believe that the Claimant was pregnant when she took the decision to dismiss her?

   (2) Was the Claimant's pregnancy the reason or the principle reason or a substantial reason for the decision to dismiss?

   (3) Additionally, in respect of the claim that she was dismissed 'for a reason connected with her pregnancy', has the Claimant established, on a balance of probabilities, the facts alleged by her as grounding this alleged reason for dismissal, namely that she was severely ill, feeling anxious, tired and consequently below par?

   (4) Did the Respondent decision maker know of the facts alleged by the Claimant as grounding this alleged reason for her dismissal?

   (5) Did the Respondent decision maker know or believe that the facts relied upon were connected with the Claimant's pregnancy?

   (6) Additionally, in respect of the claim that she was dismissed because of her 'pregnancy related illness' under **section 18 of the Equality Act 2010**, has the Claimant established that she was ill as a result of her pregnancy and/or that any illness resulting from her pregnancy caused her performance to be deficient in any material respect?

(7) Did the Respondent decision maker know or believe that the Claimant was ill as a result of her pregnancy?

(8) Did the Respondent decision maker dismiss the Claimant because of deficiencies in her performance? If so, did the Respondent decision maker know or believe the Claimant's pregnancy-related illness was the reason for those deficiencies in her performance which were reasons for deciding to dismiss her?

(9) The Claimant withdrew her complaint under **section 13 of the Equality Act 2010** during the hearing because **section 18(7) of the Act** precludes it.

The Facts

7. The Respondent is a multi national partnership of solicitors and registered foreign lawyers, authorised and regulated by the solicitors' regulation authority. It has 26 officers worldwide and there are 43 fee earners resident in London. About 75% of the London lawyers originally qualified in the UK and approximately 25% in the US. The core practices in the London office are corporate/commercial, mergers and acquisitions, disputes, and a growing finance practice with particular emphasis on commercial lending, structured finance and corporate trust matters. Strategic expansion has been a key priority of the London office from late 2014 onwards. As to gender, 45.8% of the total lawyers other than partners are female and 20.3 of the partners are female. Women hold office managing partner leadership roles in 9 out of the 26 offices worldwide and the chair is a woman. The Tribunal accepted that this level of female presence was higher than is usual in the city. The appointments of Mrs Nathanson and Ms Kelly were part of the strategic expansion plan.

8. Mrs Nathanson on her arrival had an urgent need to recruit assistance and early appointed Mr Lukasz Napieraj, a junior six month qualified lawyer, and was seeking to add somebody more experienced to her team. The Claimant, who was placed at City Bank Corporate Trust restructuring group by the Axiom agency, was contacted by a recruiter with a view to a position with the Respondent in April 2015. The email from the recruitment agency to the Respondent introducing the Claimant stated that she had a fourteen month old son and would appreciate some degree of flexibility in her working regimen. The Claimant was interviewed on the 2nd March 2015 by Ms Osborne and Mrs Nathanson, which went very well. The Claimant stated that she made it very clear at interview that her family was a priority and although happy to work hard, she needed to be able to work from home when she wished and that she also made very clear that she had little experience in corporate trust and had only had experience of working on the post-closure side of deals, her experience being mostly in capital markets. The Respondent, and in particular Mrs Nathanson, was very impressed with the Claimant and in an email immediately after the interview said "it is a resounding YES from me." The Claimant had a second interview with other

partners and HR and Mr Clinton-Baker of HR said in a subsequent email "there has been a trend in Alycia's question relating to lifestyle, maternity leave etc but Helena is convinced she will be good for her team." Another partner said that the Claimant must a very talented lawyer to have survived in the firm White and Case for so long and she had said that she was a wizz at drafting prospectuses. Mrs Nathanson had gathered from the Claimant at interview that she was very highly thought of by her supervisor/boss at City Bank, Ms Jillian Hamblin. This impressed Mrs Nathanson, who very highly respected Ms Hamblin's reputation, however she did not follow up and take out specific references on the Claimant, having accepting the Claimant at her word.

9. After some internal debate as to whether or not the Claimant would be taken on as Senior Associate or the higher role of Counsel, (regarded as partner level in waiting), the decision was made to offer the Claimant the role of Counsel in the banking department, her duties to include; the provision of legal advice to the firm's clients; marketing the services of the firm to clients and prospective clients and such other duties within the reasonable discretion of the firm as were appropriate to her job and her level of skill and experience. Her contract stated that there would be a six month probation period terminable during that time on either side by one month's written notice. The probation period was extendable at the firm's discretion. Her starting salary was to be £160,000 per annum plus a share in the discretionary shared fee bonus scheme and performance bonus programme. The Claimant had been earning approximately £103,000 per annum during her placement with City Bank although with her previous employer she had been earning something in the region of £135,000 per annum.

10. The Claimant began her employment on 18 May 2015 working with Mrs Nathanson and the two had a very good and developing relationship which Mrs Nathanson, sometime in June, regarded as becoming a personal friendship. They had much in common according to Mrs Nathanson, were of roughly the same age and both had young children.

11. From the Claimant's perspective, from the moment that she joined the Respondent's employ until the meeting on 12 October 2015, she had received no negative feedback whatsoever either from clients or from Mrs Nathanson or anyone else internally or externally, she felt that she was working with little or no supervision, was doing a very good job and had no reason to think otherwise. When she completed a self evaluation in September 2015 she gave herself the highest marks in all categories, and also prided herself in bringing in Project Sport in June 2015, the Respondent's first high yield bond transaction, via one of her contacts from law school. Mrs Nathanson she did not deny that the Claimant had been helpful in getting this Project in, and that the Claimant's communications with the other team on the bond side were amicable and even constructive at times, however, she had noted that the Claimant had missed some very basic concepts such as notices needing to be in writing, to whom notices should be sent in different instances and what happens upon the issuance of

certain types of notes etc, and when asked how she came to miss these matters, the Claimant had replied that she had not seen them in any precedent that she had examined for this purpose. Mrs Nathanson said that she found herself giving more support to the Claimant than she had been giving to Mr Napieraj, who was only six months qualified.

12. During May 2015 in dealing with another major deal, DNAV, Mrs Nathanson stated that she was concerned that the Claimant had overlooked the fact that the client was also the agent in this deal and felt that the Claimant had dealt unreasonably sharply with Mr Napieraj in relation to his response to a task which she asked him to carry out. Overall Mrs Nathanson came to the view that the Claimant had an uncritical over dependence on precedent and was not able to draft documents without difficulty when required to do so from scratch. She also appeared to miss matters which Mrs Nathanson regarded as fundamental for somebody of her ten years PQE experience, seemed to be unfamiliar with certain kinds of documentation and their meaning and significance and asked questions which made Mrs Nathanson concerned about her technical legal skills. The Claimant on one occasion telephoned a old contact of hers at City Bank regarding the language used in a document which was not related to City Bank, now a client of the Respondent, which Mrs Nathanson felt to be entirely inappropriate and she began to fear that the Claimant was operating at the level of an inexperienced junior solicitor. Further, the Claimant began to complain about how stupid certain other attorneys were on the other side of a particular deal.

13. In mid June the Claimant went, as part of the Respondent's team, to a global conference in Barcelona where Mrs Nathanson found the Claimant to be a superstar in relation to her marketing skills, saying that she was articulate, confident, personable and excelled at social events. Mrs Nathanson's feedback on this matter to senior management was quite outstanding "I never doubted that Alycia would not perform, she outdid so on all fronts. She tirelessly campaigned for the cause, she worked like a pro of decades of experience … "this was her first global ABS and my confidence in her grew a thousand fold."

14. The Claimant's self appraisal was commented upon by Mrs Nathanson in its first version in early August. However, she accepted that she had updated it on 24 September and had made it far less positive in tone, although the overall score of 4 (regularly meets expectations, sometimes does not meet expectations) was about the same. Mrs Nathanson was very highly complementary about the Claimant's marketing and business development skills but, in the actual practice of law, her opinion was that the Claimant relied heavily on others when formulating her views and needed to shake off the in house role and appreciate that she is now the one who has to process, analyse and formulate. Mrs Nathanson stated that most attorneys would be given ratings of 3, 4 or 5 and that the higher ratings up to 7 would be expected for somebody in Counsel positions. She was unable to produce the earlier version of her appraisal dating from early August since the later amendment, for which she had got permission from HR, had replaced the

earlier text. She told the Tribunal that she felt she needed to update it because of her growing concerns about the Claimant's performance.

15. The Tribunal noted that this relative negativisation of the Claimant's appraisal occurred after 26 August when Mrs Nathanson had a call from Jillian Hamblin of City Bank in which Ms Hamblin said that she would not be happy with the Claimant being in charge of any part of a transaction in which the Respondent was instructed, since she was not of the calibre that they expected of their external advisors. Ms Hamblin said that the Claimant could be involved but never lead and that Mrs Nathanson would have to supervise all that the Claimant did. She also expressed surprise that the Respondent had not asked her to give a reference on the Claimant before she was hired. Mrs Nathanson told the Tribunal that this came as a huge bombshell since she had repeatedly heard from the Claimant how strong and good her relationship had been with Ms Hamblin and, in particular, how much Ms Hamblin had respected her. Mrs Nathanson greatly blamed herself for not having checked the position by taking out a reference with Ms Hamblin before the Claimant's recruitment.

16. On 27 August at a wine tasting, the Claimant was not drinking and said that a client had made a loud comment noting that fact. However, Ms Nathanson stated that she had heard nothing of that exchange. On 2 October, at a 40th birthday party with the Claimant and Mrs Nathanson as two of a group of four, the Claimant took part in a champagne toast for the birthday person. She stated that she had only sipped the champagne.

17. Shortly after Ms Kelly arrived at the Respondent in early August 2015, she was instructed in a transaction code named Project Sun, in which she acted for a private equity firm. It was the first transaction upon which she had been instructed by this firm and the Chief Executive Officer was Jonathan Winer. Project Sun was a complex structured finance transaction in which the Respondent was to review all transaction documentation and negotiate such documentation on behalf of their client. They were also to be responsible for drafting the disclosure section of the prospectus.

18. Ms Kelly's evidence was that on Monday 14 September, the Claimant said that she was bored and currently had very little to do to which Ms Kelly replied that she could really use some senior level assistance on the new Project Sun upon which Mr Napieraj was already providing junior level support. The Claimant in evidence disputed that she had said that she was bored but accepted that she had had little to do work-wise at the point. On 15 September Ms Kelly had a conversation with Mrs Nathanson and asked if the Claimant could give her some support with Project Sun. Mrs Nathanson was agreeable. On 17 September, the Claimant came to offer her assistance and Ms Kelly asked if she could carry out an initial review of the first drafts of the bond documentation, which she assumed the Claimant would be familiar with from her previous work experience. The Claimant at that stage said that writing business descriptions for emerging market issuers had been her "bread and butter" at her previous employment and that she

had spent years doing little else. Ms Kelly asked if she would therefore prefer to work on the prospectus business section instead of reviewing the transaction documentation and the Claimant said that she would. Ms Kelly asked if she was sure because she knew that it involved a lot more work than she had previously intended to give her, but the Claimant said she knew exactly what was required and would definitely prefer to work on the disclosure section/business section. Ms Kelly had initially been intending to work on the disclosure section herself with help from Mr Napieraj, but was happy to leave the Claimant to deal with something which she clearly had considerable seniority and experience in.

19. The Claimant on 17 September told Ms Kelly that she had to go to an acupuncture appointment to help with a problem with which she had suffered for more than a decade, but did not provide any further detail. Ms Kelly stated that the Claimant did not look unwell or give any sign that she was unwell and did not say that she was pregnant or suffering from acute morning sickness, dizziness, faintness or nausea.

20. On 18 September, Ms Kelly gave the Claimant a detailed description and guidance as to what she wanted to be done in order to produce, as quickly as possible for the client, a framework for the business disclosure document; a framework containing a list of headings with a brief outline skeleton of the type of information required to populate each section, together with a preliminary list of questions for the client where it was felt that more information would be needed in order to draft the business disclosure. She wished to get this document out to the client on that Friday but realised that Monday would be a more realistic target. The Claimant took the material away to work on.

21. At 8.53am on Saturday 19 September, the Claimant emailed Ms Kelly expressing her anxiety about what a really large task she was engaged in and her concern about getting it done by Monday, but that she would go into the office to work on the Saturday and would email the results after she had done so. Ms Kelly emailed back two hours later reassuring the Claimant that they were only talking about a framework and a list of questions to be ready by sometime towards the end of Monday, at which the Claimant expressed some relief.

22. Upon reading the draft on Monday morning, Ms Kelly became very concerned because the draft produced by the Claimant was not a framework at all, but was instead a rough draft of the business disclosure itself and secondly, and more fundamentally, it was the wrong type of disclosure for this type of transaction. She felt immediately that the Claimant had not produced what she had been asked for. She immediately went to discuss the matter with the Claimant and found she had not taken on board any of the discussions which they had had on the previous Friday and began to question in her mind whether she had actually understood those discussions. On the Monday afternoon, after a call with the client had confirmed that Ms Kelly's view of what was required was the correct one, she felt exasperated

that a complete change of direction from the Claimant's draft was going to be required. The Claimant then started to complain about how she hated these sorts of transactions and that this sort of work was the reason why she had left White and Case, her previous employer, in the first place. Ms Kelly said that this was the first time she had ever mentioned this and she reminded the Claimant that she had volunteered for this particular task. However, in order to appease and encourage the Claimant she went out and got a small box of chocolates for her that afternoon. The Claimant continued to work on the document.

23. On Tuesday 22 September following another detailed discussion with the Claimant, Ms Kelly felt that things did not seem to have moved forward at all and she was now becoming extremely anxious herself since a phone call was booked with the client at 5pm that afternoon. She went to speak with Mrs Nathanson and told her how worried she was, expressing her concerns regarding the Claimant's performance. The Claimant told Ms Kelly that she had been unable to find a project bond prospectus which may have provided some form of precedent but Ms Kelly herself managed to find one for a roughly approximate project, within 10 minutes of looking on the internet. The Claimant then accused Ms Kelly of changing her mind and the two had an emphatic exchange of views which fell just short of an actual argument.

24. Ms Kelly could not wait any longer for the Claimant to produce something and therefore pieced together a very rough handwritten list of headings for use in her call with the client two hours later and managed, as she put it, to 'wing it' on the call with the client sufficiently for the call to be satisfactory and constructive.

25. Ms Kelly told the Tribunal that from the first few days of working with the Claimant she was very unimpressed with her performance and the level of supervision which she appeared to require, given her level of experience and status as Counsel. At the suggestion of Ms Kelly's husband who was also a lawyer and with whom she had discussed her concerns regarding the Claimant at home, Ms Kelly began to record a detailed narrative of events as they occurred from the 14th September until 23rd September, on which date she emailed the record to herself but did not share it with anybody else. However, she subsequently used it as an Aide Memoire when replying to an email request from Ms Osborne on 22 October regarding the quality issues which she had had with the Claimant. These were that:-

    1. The Claimant has to have a precedent before she feels comfortable putting pen to paper. Once she has that precedent she is able to work at a reasonable pace and draft reasonably well. However, the need for a precedent has led her down completely the wrong track on occasion.

    2. When there is no precedent as a base, the Claimant's production has been incredibly slow and when something is "too difficult" she puts it off and it is unclear whether her reluctance to tackle something difficult is due to lack of understanding or an unwillingness to put in the effort or

something else. Her fall back position is to mark it for Ms Kelly's attention.

26. On Wednesday 23 September Ms Kelly had a long discussion about the Claimant with Mrs Nathanson at which point both felt that it was important that Ms Kelly's experience of the Claimant's performance should be fed into Mrs Nathanson's appraisal form, which Ms Nathanson had already completed. Ms Kelly stated that she told Mrs Nathanson that she did not believe the Claimant to be operating at a level expected for someone of her experience and status and that they should probably be discussing what to do at the end of her probationary period. Ms Kelly felt that the Claimant was operating at the level of a three or possibly four year qualified assistant solicitor and not at the level of ten year qualified Counsel.

27. During the following week there were several calls with the client involving the Claimant and sometimes Ms Kelly. Ms Kelly observed that on the phone the Claimant sometimes had difficulty in getting her point across, even when her points were correct, and that in dealing with Mr Winer as client there were times when she did not seem to notice that her tone irritated him. During a call on 5 October in particular Ms Kelly became aware that Mr Winer was getting quite irritated and his tone demonstrated this, but the Claimant seemed to be oblivious to it to the point where Ms Kelly took over the call completely and did all of the talking from that moment onwards. She said that the Claimant did not really seem to notice this either.

28. At 12.46am on 6 October 2015 Mr Winer sent the following email to Ms Kelly "Rachel I would strongly prefer not to work with Alycia if there is any alternative. I have not found her to be value added in any way, and indeed, harmful to this process. I am frustrated that we are not getting the benefit of your insights but instead Alycia's incoherent comments in the calls and in the documents. At what rate are you planning to bill Alycia's time? Given her resume and work product, I assume she will not bill above associate levels. Jonathan".

29. Ms Kelly took this client complaint very seriously. At 6.58am, she emailed a reply to Mr Winer apologising for his bad experience and stating that it was her first time working with the Claimant, who had come from White and Case with a lot of experience in drafting disclosure prospectuses, particularly in emerging markets, so that she thought she would be the perfect person to work with her on this. She went on to say that there was too much work for her to do on her own, but that she would ensure that she was involved in every aspect and that Mr Winer could deal with her directly and that once the project was through this stage, "I will take at Alycia off the transaction altogether. Please don't worry about the billing aspect either". At 7.44am on 6 October, Ms Kelly forwarded Mr Winer's complaint to Mrs Nathanson saying "this is a little harsh, Alycia has actually been working quite well in the last week and what she is saying and asking for is actually correct but it is the way that she does it that I think they find incoherent and irritating. I have found on calls that I have to explain her comments as she does not seem

able to get across her point in a manner that the client understands. We had a very long call last night and I ultimately stopped Alycia from speaking at all, although she didn't really seem to notice, because she just seemed to have a knack of winding the client up again without being aware of it." Mrs Nathanson replied that they needed to speak before sending the complaint on to Ms Osborne and that she could relate to what the client was saying to a degree. She then provided an example from a file that she had worked on "that is what happened with the "may" versus "shall" debate, although of course in that instance the content was wrong too. This needs now to be brought to Alycia's attention too." Ms Kelly told the Tribunal in evidence that the Claimant had at one point said to Mr Winer during the telephone call; "just imagine you are explaining it to your mom", which had made her cringe, as she felt that this was not an appropriate way to speak to an experienced CEO of a private equity firm for whom you are working for the first time and barely know.

30. Mrs Nathanson stated that she felt embarrassed, guilty and desperately sorry for Ms Kelly, as this was one of her first big transactions after joining the firm. She herself had just returned from Finland to attend to her elderly mother and was not feeling well herself. She emailed Ms Kelly apologising, stating that she felt responsible, (presumably on the basis that she had hired the Claimant in the first place), and saying "how could I have got this so wrong Rachel, I am so sorry." Mrs Nathanson also feared, as a relatively new partner herself, that Ms Osborne would be disappointed with her for lack of judgment in hiring the Claimant.

31. Ms Osborne, Ms Kelly and Mrs Nathanson met together to discuss the Claimant during that morning, 6 October, at about 10am. At 11.19am Ms Osborne sent an email to HR stating "we are going to give Alycia one month's notice on Friday 23 October 2015 – in advance of the expiry of her probation period. I would like to also issue pay in lieu so that Friday is effectively her last day. I assume that it is possible?" HR replied "yes I can prepare a cheque which you can hand to her on 23 October 2015." Ms Osborne told the Tribunal that it was her decision to terminate the Claimant's employment and that it was taken entirely on the basis of her work performance being sub-par relative to their expectations for Counsel and that she posed a risk to client relationships. She said that she believed they had made a mistake in recruiting the Claimant for this high level and highly paid role as the Claimant was simply not capable of functioning at Counsel level and even her purported key relationship at Citybank was entirely uncertain. Ms Osborne stated that the components of this decision were that the complaint from the client indicated that he had no confidence in the Claimant's work and the three had discussed the Claimant's poor performance on Project Sun overall. None of the three had ever received a client communication of that kind before. They also discussed Mrs Nathanson's feedback received from Jillian Hamblin indicating that the Claimant did not have Citybank's confidence to lead on any deal and that the Claimant appeared to have two key issues: she seemed unable to work to a high standard and had difficulty communicating with clients on substantive

issues. Ms Osborne said that it became clear to her that the Claimant had lost the confidence of both Ms Kelly and Mrs Nathanson as well as the client on Project Sun. They ascertained that the Claimant's six month probation came to an end on 17 November and decided that it had been a mistake to hire her and that it was proper to bring her employment to an end before the expiry of her probation period.

32. Ms Osborne said that the second half of the hour long meeting was spent discussing the process and mechanics of the Claimant's termination. She herself felt that the Claimant's employment should be terminated that very day, on the grounds that her continued employment created a risk for the firm. However, Ms Kelly felt that this would leave her in an untenable position in relation to the completion of Project Sun and she wanted to have some support rather than none, even if she had to supervise the Claimant's work closely, because her new senior associate did not start work until 26 October. Ms Osborne accordingly decided to retain the Claimant until 23 October at which date she would be given one month's notice which would, however, not be worked but would be paid in lieu.

33. The Tribunal concluded unanimously, on the basis of all the evidence before it, that the reason for the Claimant's dismissal was capability. Ms Osbourne and her partner colleagues were genuinely convinced that the Claimant was unable to operate at the level of seniority of the Counsel role to which she had been appointed, a level regarded as 'partner in waiting'. The final trigger was Mr Winer's complaint and the decision to dismiss was taken within three hours of its receipt. The Tribunal was of the view that the Claimant had received "feedback" on the shortcomings in her performance from her various managers during her employment, however, because it was not forcefully expressed in a manner more appropriate to a more junior lawyer, she regarded it as merely normal collaboration and not something which should have caused her to register any concern. However, at this level of seniority, the input which Ms Kelly and Mrs Nathanson were having to give the Claimant, which at times exceeded that necessary for Mr Napieraj, surprised them in relation to someone of the Claimant's seniority.

34. It was not disputed in these proceedings that the Claimant was pregnant in July 2015 and that she had a history of miscarriage which had caused her considerable distress and anxiety. She stated that she had been reticent to volunteer for Project Sun at first because she was suffering from significant early pregnancy symptoms, including acute morning sickness, nausea, dizziness along with feeling faint and suffering from migraines. She said that she did not want to disclosure to anybody at the Respondent that she was pregnant until the Doctor told her that she was safely past the first trimester when the serious risk of early miscarriage had passed, since she had had two previous early pregnancy miscarriages and was trying to protect herself from the painful experience of having to tell others that she was having a miscarriage should that happen. She stated that she also feared retaliation for falling pregnant based on an alleged comment made by Mrs Nathanson.

35. The Claimant alleged that this occurred in June/July 2015 where she told Mrs Nathanson that she was feeling nauseous and that perhaps her new glasses were not the right prescription, to which she alleged that Mrs Nathanson responded "well you better not be nauseous for any other reason" and looked at her stomach, thereby insinuating that she had better not be pregnant. Mrs Nathanson categorically denied that she had ever insinuated that the Claimant had better not be pregnant. She stated that she herself had children and had never been deterred from recruiting a female by the thought she may at some stage need to take maternity leave, always looking to the long term and just wanting the best possible person for the job. Mrs Nathanson's recollection of a conversation on 6 July was that there was no mention of any nausea but only headache and that the Claimant had said she was concerned as to whether the prescription for her new glasses was correct. She said that she and the Claimant had discussed, early in the recruitment interview process that her own pregnancy had been very difficult and that she herself had had several miscarriages. She said that she and the Claimant were very friendly and had several conversations comparing notes as to how violently ill they had felt during their first pregnancies.

36. The Tribunal did not accept that Mrs Nathanson had made the alleged insinuation that the Claimant should not be pregnant because:-

    1. It is inconsistent with Mrs Nathanson insisting that the Claimant was the right person for her team at the recruitment stage, despite the Claimant's insistence on family/maternity leave policies at interview and this issue being flagged up specifically by HR.

    2. Mrs Nathanson had been very sick during her own pregnancy and was not likely to regard sickness in pregnancy as proper subject matter for levity.

    3. She gave convincing evidence in Tribunal of her commitment to the employment of working age mothers and getting them back to work and the Tribunal did not believe that this event occurred as the Claimant alleged. On balance, the Tribunal also accepted Mrs Nathanson's evidence, on a balance of probabilities, that nausea was not mentioned by the Claimant, but that headache was mentioned in the context of the Claimant's being a new glasses wearer fearing that she may have been given the wrong prescription.

37. As to how sick the Claimant was during her pregnancy: the Tribunal noted that in her GP and Hospital Notes at the period of her early pregnancy in April 2013 "severe nausea" figured prominently and also a hospital referral referred to this problem. However, in the Claimant's GP Notes for the period of her second pregnancy running from April 2015 through to her dismissal, there is no mention whatever of nausea in her GP records and on 26 August 2015, her GP's comment was "six weeks pregnant … feels well/tired". The Tribunal did not find convincing the Claimant's assertion that she had not conveyed this message to her Doctor nor that she made no mention at all of

nausea to her GP despite suffering very severely from it throughout her early pregnancy because the suggestions for its treatment during her first pregnancy had been of no use. The Tribunal unanimously concluded, on a balance of probabilities on all the evidence before it, that the Claimant, although undoubtedly exhausted and feeling very anxious about the potential of a miscarriage was not as troubled by nausea during her second pregnancy as she had been during her first, because had she been as debilitated as her GP notes for 2013 suggest, "nausea very troublesome – difficulty functioning", she would not have been able to attend work as she did, without any sick days during the entire period. The Tribunal also accepted the evidence of the Respondent's witnesses, which was consistent and credible, that the Claimant did not display any symptoms of nausea or illness during this time. The Tribunal also noted the Claimant's own assertion in evidence that she had been bent on concealing her pregnancy until the first three months had elapsed for the reasons set out in paragraph 34 above, and the Tribunal concluded unanimously that she succeeded very well in this objective.

38. The Tribunal concluded unanimously that neither Ms Osborne, Mrs Nathanson or Ms Kelly had any knowledge, belief or suspicion that the Claimant was pregnant until they received her email on 10 October revealing the same explicitly. The reasons for this are:-

    1. The Claimant was not off sick and had given no indication that she was sick at work. Discussing the optician prescription and headache and even acupuncture in a different context did not convey that she was pregnant.

    2. She did an extremely good job of hiding her pregnancy, working from home when she felt too tired to stay at work, and did not say anything or do anything to give rise to a suspicion in the minds of her work colleagues.

    3. Not drinking wine on one occasion during a wine tasting in July or August is an insufficient signal, even had Mrs Nathanson heard the comment made by the client as to the Claimant not drinking, which she denies having heard. People do not drink on various occasions for a variety of reasons. The Tribunal noted that on the 2nd October, the Claimant joined in a champagne toast and even if she only took a sip or two, this would not have been apparent to anybody casually observing.

    4. All three of the Respondent's witnesses said that they saw nothing which indicated that the Claimant was feeling unwell and during the latter period Ms Kelly said she spoke and worked with her every day on Project Sun and saw nothing untoward.

    5. The exchange of emails internally between the Respondent's witnesses following the Claimant's revelation of her pregnancy on 10 October

indicated strongly to the Tribunal that this was indeed news to them and that they had no prior knowledge.

39. On 7 October 2015, Mrs Nathanson emailed the Claimant saying that she could not attend a client rugby match she had been going to attend with the team because work had to be prioritised and there remained a good deal to be done on Project Sun by certain deadlines. It was also the case that the Respondent witnesses felt uncomfortable about the Claimant entertaining clients, they having made a decision the previous day to dismiss her. It was clear to the Tribunal that relationships had considerably deteriorated, notably between the Claimant and Ms Kelly with whom she was still working and they had a lively discussion on the 7th October which fell just short of an argument. The Claimant was clearly upset about the others having decided behind her back that she was not to attend the rugby match and Mr Napieraj going in her stead.

40. At 6pm on Saturday 10 October 2015, the Claimant wrote an email to Mrs Nathanson and Ms Kelly saying that she wished to clear the air on what she perceived to be 'a misunderstanding amongst us'. She then went on to set out in some detail her perceptions of her experience on Project Sun and stated that the conversations which she had had with them during the recent week had been quite unfair from her perspective. She stated that she had not only given more than 100% of herself at work but also pushed herself to her physical limits. "While I have been devoting my all to this transaction, it has been made clear to me that my efforts are not enough. The focus has seemed to be on what I have not achieved rather than what I have achieved to make this deal happen. I believe that I have produced a strong work product in a short space of time." In the final paragraph the Claimant informed them that she has been told by her Doctor that it was safe to disclose at this point that she was 12 weeks pregnant and that while she has had a healthy pregnancy so far it had also been an incredibly challenging first trimester. She stated that as with her first pregnancy "I have suffered from severe acute morning sickness/nausea, dizziness and migraines" and throughout this she has been working incredibly hard and long hours on Ms Kelly's deal while suffering from significant physical symptoms. However, she acknowledged that a few days last week she had not been able to bill the long hours that she had been and that this was a result of these physical symptoms.

41. This email was forwarded by Ms Kelly to Ms Osborne and also sent from Mrs Nathanson to Ms Osborne; Ms Osborne's reply was to agree to a meeting and then "it does not change our views or approach but just confirming with Gary" (Gary being the Employment Lawyer in the Firm). Mrs Nathanson replied "no, but this makes it just a little more complicated." Mrs Nathanson stated that the news came as a surprise and this email was the first indication that she had that the Claimant was pregnant or had been suffering from any pregnancy related symptoms. Both Ms Kelly and Ms Osborne equally found the news a revelation. Ms Osborne checked the hours logged and found that the Claimant had been working 6-7 hours a day and none of

them regarded this as working particularly long hours or incredibly hard. Ms Osborne and Mrs Nathanson met on 12 October to discuss the contents of the Claimant's email and they arranged to meet with the Claimant later in the day, Mrs Nathanson stating in evidence "on the understanding that it would not change that the Claimant was going to be let go." However, Ms Osborne told the Tribunal in evidence that she wanted to use the meeting with the Claimant to explore the points that she had raised and specifically wanted to explore whether the Claimant's pregnancy related symptoms might have contributed in any way to the poor quality of her work and to the client's loss of confidence in her. She stated that if there had been any such link between her feeling unwell and slipped quality she would have given further consideration as to whether to implement the dismissal decision made on 6 October. The Tribunal concluded that Mrs Nathanson very definitely wanted the Claimant out but that Ms Osborne to some extent left the door a little open on that decision and was prepared to give the Claimant a hearing and accepted that if the Claimant had shown recognition that the quality of her work was below par and had established that this had been caused by her pregnancy related illness, then Ms Osborne would have considered extending her probation period rather than dismissing her.

42. The Tribunal had before it Ms Osborne's handwritten brief note of the meeting with the Claimant together with a typed up version of those notes, together with a fuller note made by Ms Osborne subsequent to the meeting.

43. The meeting began at about 2.15pm and began with Ms Osborne congratulating the Claimant on her pregnancy. The discussion then followed about the points raised in the Claimant's email and the concerns which the Respondent had had about the Claimant's performance to date. The Respondents raised the complaint made by Mr Winer and Mrs Nathanson told her about the feedback which Mrs Nathanson had received from Ms Hamblin at Citybank, although without identifying the source in person. The Claimant stated that she had sent her email to preserve her reputation in the face of her conversations with Ms Kelly and Mrs Nathanson, which she viewed as personal attacks. The Respondent raised the various concerns in detail which they had; including the difficulty of working without precedent and that she appeared to be operating more at the five year PQE level. The Claimant stated that she was surprised by the client complaint, had thought that she was doing a good job and had never had negative client feedback in her whole career. She expressed surprise that she was not meeting expectations. Under the heading of "productivity?" in Ms Osbourne's handwritten note of the meeting, the Claimant said that there had been 'a perfect storm of not feeling well and the work for Ms Kelly'. She said that she had received very little feedback from Mrs Nathanson, that she was trying to do the best she could to improve her expertise and that the Respondent had well known that she only had two years corporate trust experience when she was hired. As a general theme, the Claimant defended the standard and quality of her work and addressed her comments about the effect of her pregnancy and pregnancy related illness to her ability to work longer hours and to meet deadlines strictly on time and stated that she had been spending

every weekend in bed. She felt that despite all of this she had been working very hard and stood by everything that she had put in her email of the 10th October. The Claimant's evidence stated that she was told at the meeting that she was not working to her maximum capacity as she was only billing an average of six hours a day and that she had defended her position of working at full capacity even when feeling so ill and fatigued during her pregnancy. She said that Mrs Nathanson began to pick apart her work product, mentioning the most banal non material things that she had done on deals and said that she had refuted everything she said and maintained that it was the first she had heard of any performance issues, that she had been running all of those deals by herself with almost no supervision and had no negative feedback whatsoever with the clients being happy with her efforts. She also reiterated that if she had had performance issues they should have discussed those with her and that this feedback had come as a complete surprise to her. She also noted that after this meeting she had continued to work on a current file unsupervised.

44. The Tribunal formed the view that the Claimant was baffled at that meeting by the challenges to the quality of her work because she genuinely believed that she had been doing a very good job and thought that it was the hours, deadlines and time issues which may have been concerns. She very largely defended the quality of her work and effectively stated in various ways that the criticisms of it were unjustified, whether because they were minor or trivial matters or whether, as she asserted in the case of Mr Winer, he had misunderstood the role of Counsel in the deal. She did not at any point acknowledge that there was a quality defect in her work nor assert that her pregnancy or pregnancy related illness had been in some way the cause of that. She stated in cross examination before this Tribunal that she felt that the criticisms were unjustified because she had received normal feedback from Mrs Nathanson and had not experienced this as criticisms but simply as normal colleague collaboration. She also stated in cross examination that the 12th October meeting was the first she had heard of any complaints and that she had then looked back at her medical records and in hindsight saw how ill she had been on those days. She accepted that she had not explicitly discussed work quality issues in relation to her pregnancy and said she did not know if she had actually said at the meeting that her pregnancy was a cause of them. It was pointed out to her that her email had said that she had had a healthy pregnancy so far and had not mentioned emotional distress. The Claimant accepted that she did not remember if she had mentioned any distress or anxiety at the meeting, although she had intended it, and had said that she was anxious about the deal they were working on. Being asked in Tribunal to comment on what she had meant by the phrase in her email: "perfect storm of not feeling well and working for Rachel" she said "I was having difficulty producing work to time because I was ill and that was the reason for sending my email". The Tribunal concluded on all the evidence that at no point in that meeting did the Claimant draw a connecting link between any issue with the quality of her work and her pregnancy or pregnancy related illness.

45. The Claimant continued to work on the deal in hand between the 12th and 23rd October and for a couple of days during that period both Ms Kelly and Mrs Nathanson were away at a work conference. Ms Osborne had requested Ms Kelly to provide a summary of the quality issues which she had experienced with the Claimant on Project Sun, which Ms Kelly provided on 22 October gleaned from the noted diary which she had been keeping since September. In summary, the main concerns set out by Ms Kelly were the overreliance on precedent but ability to work at a reasonable pace once a precedent was available; very slow and reluctant work when a precedent was not available and the inability, even after several repetitive conversations, to see where a clear error or omission had been made in her draft; in dealing with clients, the inability to notice that the manner and phrasing of a question was irritating a client and being oblivious to the effect that she was creating when irritating them. Ms Kelly did acknowledge that over the past week or so following the meeting with Ms Osborne, the Claimant's work had definitely improved somewhat, that she had been rather more accommodating, had shown less of the attitude that was evident at the outset and had even been proactive about moving things along, in other words "she has been acting for the first time as if she was part of the team". Nonetheless the core issues in relation to her drafting remained the same for Ms Kelly, and she had come to realise that the real issue is that the Claimant was simply not operating at Counsel level on this transaction nor even at senior associate level. "I would say that she is operating at the level of three or possible four year qualified assistant, able to produce some good work but with a lot of guidance if not complete supervision and not at a level where she is able to take any step or decision on her own or work independently."

46. The Claimant was called to Ms Osborne's office on 23rd October, with HR in attendance, and told that her employment was being terminated for performance capability reasons. Ms Osborne told the Claimant that they felt that her performance was not adequate, given her senior position as Counsel and the level of her salary.

47. On 26 October 2015, a letter from Clinton Baker, Director of Administration, confirmed to the Claimant that, following the meeting on the 23rd, her employment would be terminated by reason of quality of work. The effective date of her termination was stated to be 22 November 2015. She was paid in lieu of one month's notice.

48. The Claimant presented her complaints to the Tribunal on 7 March 2016.

The Law

49. As to the law, the Tribunal directed itself as follows:

    1. **Section 99 of the Employment Rights Act 1996,** so far as material, provides that an employee who is dismissed shall be regarded as

unfairly dismissed if the reason or principle reason for the dismissal relates to pregnancy, childbirth or maternity.

2. **Regulation 20 of the Maternity and Parental Leave etc Regulations 1999** provides that an employee who is dismissed is entitled under **section 99 of the Employment Rights Act 1996** to be regarded under that **Act** as unfairly dismissed if (a) the reason or principle reason for the dismissal is … a reason connected with the pregnancy of the employee.

3. **Section 18 (2) of the Equality Act 2010** provides that a person discriminates against a woman if, in the protected period in relation to a pregnancy of hers, he treats her unfavourably (a) because of the pregnancy or (b) because of illness suffered by her as a result of it.

4. **Section 136(2)(1) of the Equality Act 2010** provides that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that the Respondent contravened the provision concerned, the Tribunal must hold that the contravention occurred. … **(3)** But this does not apply if the Respondent shows that it did not contravene the provision.

5. The Tribunal reminded itself that discrimination may not be deliberate and may consist of unconsciously operative assumptions on the part of the employer. It is therefore incumbent upon the Tribunal to examine indicators from the surrounding circumstances and events, both prior and subsequent to the acts complained of, in order to assist it in determining whether or not particular acts were discriminatory. (**Anya v University of Oxford [2001] IRLR 337**).

6. Inferences of unlawful discrimination may not properly be drawn solely from the fact that the Claimant has been unreasonably treated, although they may properly be drawn from the absence of any explanation for such unreasonable treatment. (**Bahl v The Law Society [2004] IRLR 799**).

7. The Tribunal had regard to the guidance provided in the cases of **Igen v Wong [2005] ICR 931** and **Madarassy v Nomura International Plc [2007] IRLR 246**, in setting about its task.

8. **Section 18 (7) of the Equality Act 2010** provides that **section 13,** so far as relating to sex discrimination, does not apply to treatment of a woman in so far as (a) it is in the protected period in relation to her and is because of her pregnancy or because of illness suffered by her as a result of it.

9. The following cases were cited before the Tribunal in argument: **CLFIS (UK) Limited v Reynolds [2015] IRLR 562 CA; Delmonte Foods**

Limited v Mundon [1980] ICR 694 EAT; Dentons Directories Limited v V Hobbs [1997] Lexis Citation 2181 EAT; H J Hinds Company Limited v Kendrick [2000] ICR 491; Abernethy v Mott Hay & Anderson [1973] IRLR 123; Indigo Design Build Limited v Martinez UK EAT/0020/14/DM; Johal v Commission for Equality and Human Rights UK EAT/0541/09/DA; London Borough of Lewisham v Malcolm [2008] IRLR 700 HL; Nagarajan v London Regional Transport [1999] IRLR 572 HL; O'Neill v Governors of St Thomas More School [1997] ICR 33 EAT; Onu v Akwiuu 2014 IRLR 448 CA; Ramdoolar v Bycity Limited 2005 ICR 368 EAT.

Conclusions

50. **Section 99 Employment Rights Act 1996 and Reg 20 of MAPLE 1999**: Having less than the requisite 2 years service entitling her to claim unfair dismissal under **section 94 of the Act**, it is for the Claimant to show, on a balance of probabilities, that the reason for her dismissal was related to or connected with her pregnancy, childbirth or maternity. The Tribunal was satisfied, on the basis of argument and the case law before it, that this test was subjective rather than objective and entailed inquiry into the mind of the employer/dismissing officer. The Claimant contended that the Respondent believed or at least 'suspected or feared' that the Claimant was pregnant from about the start of October 2015 and that the Tribunal should regard any denial of knowledge with a degree of scepticism.

51. On the basis of the facts found by the Tribunal, after careful scrutiny and consideration, the Tribunal concluded unanimously that neither Ms Osbourne nor any of her management colleagues nor anyone else at the Respondent, in fact had any knowledge, belief or suspicion that the Claimant was pregnant prior to her email of 10 October 2015, as set out in detail in paragraph 38 of these Reasons. The Tribunal was also unanimously satisfied that these persons had no knowledge, suspicion or belief that the Claimant was unwell at all or suffering from any symptoms which might have put them on inquiry as to whether or not she was pregnant. She was never off sick, did not mention nausea or illness, save for a headache related to an eye prescription and an unspecified longstanding condition requiring acupuncture, nor give any other indication or appearance which led to any of her colleagues harbouring such a suspicion, nor which might reasonably have done so. In fact, she did a very effective job of concealing her pregnancy at work until 10 October 2015.

52. The Tribunal was unanimously satisfied that the reason for the Claimant's dismissal was the Respondent's genuine assessment that her performance during her probation period had been at a level markedly below what was expected of Counsel on an annual salary of £160,000 and that the decision to dismiss was made on the morning of 6 October 2015, as set out in the Tribunal's detailed factual findings in paragraphs 31 and 33 of these Reasons. The Respondent had before it at the date of the dismissal decision not only the observations of Ms Kelly and Mrs Nathanson of the Claimant's

performance but also a strongly worded letter of complaint from the Sun Project client, Mr Winer, and a proviso from Citibank, a new client with intimate prior knowledge of the Claimant's work, that she must not lead on, but must be supervised in, any deal with which she was involved. The Tribunal found the Respondent's evidence regarding the Claimant's poor performance wholly credible and consistent and was entirely satisfied that this was the reason for her dismissal.

53. Further, the Claimant at no point up to the date of dismissal asserted to the Respondent that her poor performance was in any way connected to her pregnancy or caused by it, for example during the meeting on 12 October, but rather asserted that there was no fault with the quality of her work. No argument was advanced before this Tribunal that notice should be taken or that it should reasonably be implied that pregnancy/pregnancy related illness, per se and without more, inherently reduces the quality of a woman's reasoning power, independent drafting capacity or ability to pick up signals of irritation/lack of comprehension in an important client. In any event, this argument, should it have been advanced, would not necessarily have explained Ms Hamblin's reservations whilst the Claimant worked for her at Citibank.

54. The Claimant therefore has failed to satisfy the Tribunal that the reason for her dismissal was related to or connected with her pregnancy, childbirth or maternity. Her complaint under section **99 of the Employment Rights Act 1996/ Reg 20 of MAPLE 1999** accordingly is not well-founded and fails.

55. **Discrimination on the grounds of pregnancy/pregnancy related illness under section 18(2) of the Equality Act 2010**: It is not in dispute that the Claimant was in a protected period in relation to her pregnancy at the material time.

56. The Tribunal asked itself if there were facts from which it could find, in the absence of any other explanation, that the Respondent had treated the Claimant unfavourably by dismissing her; a) because of the pregnancy or (b) because of illness suffered by her as a result of it.

57. As to a): the Respondent conceded that there was a fact from which it could be inferred that the dismissal was on the grounds of the Claimant's pregnancy – namely that the Claimant informed the Respondent that she was pregnant on 10 October 2015 and was dismissed on 23 October 2015.

58. The Tribunal therefore looked to the Respondent for an explanation and, on all the evidence before it, concluded unanimously that the Respondent had satisfied it on a balance of probabilities that the Claimant's pregnancy had played no part whatever in the decision to dismiss her, because:

    a) Despite the formal dismissal being communicated to the Claimant on 23 October 2015, the decision to dismiss was actually made on the

morning of 6 October 2015, within a few hours of receipt of a strongly worded client complaint about the Claimant and 4 days before the Respondent had any knowledge, belief or suspicion that the Claimant was pregnant.

b) The Tribunal was unanimously satisfied that the reason for dismissal was capability/sub-par performance for someone of the Claimant's seniority and salary.

c) The dismissing officer, as well as Ms Kelly and Mrs Nathanson, are working mothers with genuine commitment to getting mothers back to work, for example in the workplace association "Bryan Cave Women". Whilst it is entirely possible that a working mother may discriminate against another woman on the grounds of pregnancy, the Tribunal was unanimously satisfied that this was not the case here. Mrs Nathanson, with Ms Osbourne's approval, decided to hire the Claimant well knowing that she was a 39 year old woman with a 14 month old child and that she had made specific inquiries at her interview stage about the Respondent's family friendly and maternity leave policies. Indeed the Claimant's interest in this area had been explicitly flagged up to management by HR at that time. It could very reasonably have been predicted that the Claimant may wish to embark upon a second pregnancy. The Claimant was nevertheless hired, because she was seen as the best person for the job, at a high level and salary and representing considerable investment in her by the Respondent.

d) It was therefore clear that had Mrs Nathanson or Ms Osbourne been in any way resistant to the notion of pregnancy/maternity leave, they had ample opportunity to decide not to employ the Claimant, before she was offered the role. The Tribunal noted that currently one Counsel and one Associate lawyer employed by the Respondent are on maternity leave and accepted that, relative to other comparable city institutions, the Respondent's statistics on the employment of women is good.

59. The Tribunal unanimously concluded that the Respondent did not treat the Claimant unfavourably because of her pregnancy within the meaning of **section 18(2)(a) of the Equality Act 2010**.

60. As to b): The Tribunal asked itself if there were facts from which it could find, in the absence of an alternative explanation, that the Respondent had treated the Claimant unfavourably by dismissing her because of illness suffered by her as a result of her pregnancy.

61. The Respondent contends that the Claimant needs to establish certain base facts in order to ground liability, namely: that she was severely ill; that her illness was the result of her pregnancy and that the Respondent knew or believed these facts. Further, if she was dismissed because of her

performance, that it was her pregnancy-related illness which negatively impacted her performance and that the Respondent knew or believed this to be the case.

62. The Claimant contends that the Respondent had suspected her pregnancy prior to the 10 October 2015. Further, having been told by the Claimant in her email of 10 October and at the meeting of 12 October of her pregnancy and her pregnancy related illness, the Respondent should have attributed her poor performance to these facts and decided not to dismiss her at that stage.

63. The Tribunal considered carefully the case law and submissions put before it on the issues of the degree of knowledge required in the mind of a decision maker and knowledge of which facts was requisite. It was not in dispute between the parties that some form of knowledge, belief, or at least suspicion was required in the mind of the perpetrator in order to ground liability for discrimination. The Respondent accepts that it had actual knowledge of the Claimant's pregnancy and some degree of pregnancy-related illness as from receipt of the Claimant's email dated 10 October 2015, although it disputes that this illness was as severe as the Claimant contends. Prior to that, the Respondent denies all knowledge, belief or suspicion of either the pregnancy or any illness. The Claimant asserts that the Respondent must have harboured at least a suspicion or fear that the Claimant was pregnant from at least early October – that is, prior to the decision to dismiss taken on 6 October.

64. It is trite law that a Respondent cannot simply assert ignorance in the face of basic facts within its knowledge which would indicate pregnancy/pregnancy related illness to any reasonable observer. However, on the facts as found by this Tribunal, the Respondent had no knowledge, suspicion or belief of the Claimant's pregnancy or any illness, pregnancy related or otherwise, or any other indicative symptoms or signs, prior to receipt of the Claimant's letter of 10 October 2015, nor of any basic facts which would have given any reasonable person grounds to so suspect or believe. The Claimant was never off sick, did not say anything about being unwell, except in relation to her eye prescription and a longstanding condition requiring acupuncture, did not show any signs of being unwell in the office, took part in a champagne toast for a leaving colleague on 2 October 2015, coped with her tiredness by sleeping at weekends and working from home when very tired and all in all made an excellent job of concealing her pregnancy until the first trimester had expired. Whether or not the Claimant was in fact less unwell than she had been during her first pregnancy, is not for this Tribunal to determine. However, it is noted that there was no reference to nausea in her GP notes at the material time and that she was, in fact, able to function in the office without showing any sign that anything was amiss.

65. As to the situation after the Respondent received the Claimant's communication of 10 October 2015, that is actual knowledge that she was pregnant and asserting that she had suffered from "severe acute morning

sickness/nausea, dizziness and migraines", the Tribunal concluded on all the evidence that this came as a genuine surprise to all 3 partners; Mrs Nathanson, Ms Kelly and Ms Osbourne. The decision to dismiss for performance/capability reasons had already been taken on 6 October.

66. The question arises as to what additional facts were made known to the Respondent on or after 10 October, and in particular at the meeting with the Claimant on 12 October, revealing facts which caused, or should have caused, Ms Osbourne to consider whether or not the Claimant's feeling unwell as a result of her pregnancy might have impacted on the performance reasons for which she had decided to dismiss her? The Tribunal accepted Ms Osbourne's evidence that she was genuinely open to giving the Claimant a hearing at this meeting, with a view to potentially extending her probation period rather than dismissing her, although it was clear that Mrs Nathanson was resistant to that idea in her own mind, perhaps because of feelings of shame and embarrassment at what she regarded as her own failure of judgment in having hired the Claimant in the first place, and especially without having taken up references with Citibank.

67. As set out in paragraph 53 of these Reasons in relation to the Claimant's **section 99** complaint, and equally material here, no argument was advanced before this Tribunal that cognisance should generally be taken, or that it should reasonably be implied, per se and without more, that either pregnancy itself or pregnancy related illness inherently reduces the quality of a woman's reasoning power, independent drafting capacity or ability to pick up signals of irritation/lack of comprehension in an important client. In any event, this argument, should it have been advanced, would not necessarily have explained Ms Hamblin's reservations whilst the Claimant worked for her at Citibank. Had the Claimant herself put this forward to the Respondent between 12 and 23 October, the Tribunal was satisfied that Ms Osbourne would genuinely have considered this explanation for the Claimant's sub-par work quality and would genuinely have exercised her discretion as to whether or not to extend the probation period, despite Mrs Nathanson's personal views on the matter.

68. Any impact on the quality of the Claimant's work is not to be inferred without it being specifically raised as an asserted fact. However, the Tribunal concluded on all the evidence before it that the Claimant at no point put forward to the Respondent that the quality of her work had suffered because of her pregnancy or pregnancy related illness.

69. From the Claimant's point of view, the meeting on 12 October was the first she had heard of any concerns about the quality of her work product and it came as a surprise to her since she considered that the quality of her work was very good. Her email of 10 October had been directed at what she believed may have been concerns about how many hours she had been able to work and whether she had had trouble meeting deadlines; that is timing and productivity rather than quality issues. When the quality concerns and the client's complaint were laid out for her at the meeting on 12 October, her

position was to deny that the quality of her work was anything other than good, as set out in detail in the Tribunal's findings in paragraph 44 of these Reasons.

70. At that meeting, the Claimant's comment "a perfect storm of not feeling well and working for Rachel" was made, according to the meeting notes, under the heading of 'Productivity' and was made in this context, according to the Claimant's own evidence (paragraph 44 of these Reasons). In the Tribunal's view, this phrase did not amount to an assertion that the quality of her work had been affected by her pregnancy related illness either in itself or in the context of the meeting and in the light of the Claimant's overall assertion that there was nothing amiss with the quality of her work. The Tribunal was satisfied that the Claimant had the opportunity at the meeting of 12 October, and indeed between that meeting and her dismissal on 23 October, to say to the Respondent that the quality of her work had been affected by her pregnancy related illness, but that at no point did she do so. In fact there was no indication that the Claimant accepted at any point that there were any defects in the quality of her work product. Her position remained that she was, and had been, doing excellent work. In these circumstances, no facts were asserted and no grounds were advanced upon which Ms Osbourne could exercise her discretion to extend the Claimant's probation period and reconsider her dismissal decision.

71. The Claimant contends that the Respondent engaged in criticism of the quality of her work on 12 October as an ex post facto justification for dismissing her because of her pregnancy/ pregnancy related illness. She contended that had her work quality genuinely been poor, she would not have been retained working on Project Sun up to 23 October. However, the Tribunal was satisfied that the Respondent took the view that at that later stage of the deal, and pending the arrival of Ms Kelly's new senior assistant on 26 October, any assistance was better than none. The Respondent had sufficient confidence in the Claimant's ability to function at the level of about 5 years PQE and would be closely supervised.

72. Accordingly, the Tribunal concluded unanimously that there were no facts from which it could find that the Respondent had treated the Claimant unfavourably because of illness suffered by her as a result of her pregnancy. Her complaint under **section 18(2)(b) of the Equality Act 2010** must therefore fail.

Employment Judge A Stewart
17 May 2017